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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VAN GIE LY,

Defendant and Appellant.

H027339

(Santa Clara County Superior Court No. CC330408)

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Defendant Van Gie Ly appeals from a judgment of conviction entered after a jury found him guilty of first degree burglary (Pen. Code, §§ 459, 460) and grand theft (Pen. Code, §§ 484, 487).[1] The trial court suspended imposition of sentence, placed defendant on probation, and ordered him to serve nine months in county jail. On appeal defendant contends the trial court erred in its instructions to the jury regarding the elements of burglary and the inferences to be drawn from recent possession of stolen property. He also contends the trial court erred in admitting evidence of his drug use and prior thefts. For the reasons stated below, we affirm.

[1] All further statutory references are to the Penal Code unless stated otherwise.

I. Statement of Facts

In mid-October 2003, Thanh Ly, defendant's father, told defendant that he could no longer live at home, because he was using drugs and had stolen items. When Mr. Ly and his wife Hue Ly returned home at about 11:30 p.m. on October 18, 2003, they discovered that the garage door appeared to have been pried open. A window near the front door was also ajar, and defendant was in his parents' bedroom. Mr. Ly told defendant to leave, and he did.

The next day, Mr. Ly realized that his wife's diamond earrings, which were worth $800, other jewelry, and two CD's were missing. When defendant returned to the house that morning, Mr. Ly called the police. The police arrived to find defendant standing by a neighbor's house. Defendant was wearing one of his mother's earrings. He also had Mr. Ly's folding knife and other jewelry belonging to Mrs. Ly.

Prior to October 18, Mrs. Ly had given defendant a key to the house, but this key did not unlock either the garage door or the deadbolt. She would also allow defendant to visit when Mr. Ly was not home.

II. Discussion

A. Modified Version of CALJIC 14.50

Defendant contends that the trial court erred in giving a modified version of CALJIC 14.50.

The trial court instructed the jury: "The defendant is accused in Count 1 of having committed the crime of burglary, a violation of Section 459 of the Penal Code. Every person who enters any building *or part thereof* with the specific intent to steal, take, and carry away the personal property of another of any value, and with the further specific intent to deprive the owner permanently of that property, is guilty of the crime of burglary, in violation of Penal Code Section 459. [¶] A building is a structure. It does not matter whether the intent with which the [entry] was made was thereafter carried out. In order to prove this crime, each of the following elements

must be proved: One, a person entered a building *or part thereof*; and two, at the time of the entry, that person had the specific intent to steal and take away someone else's property and intended to deprive the owner permanently of that property." (Emphasis added.)

Defendant acknowledges that one can be guilty of burglary if he or she forms the specific intent to steal before entering into a room of a building. (*People v. Sparks* (2002) 28 Cal.4th 71, 87.) However, he focuses on the definition of "part," and argues that the modified version of CALJIC No. 14.50 improperly permitted the jury to convict him of burglary if they found that "he formed the specific intent to steal when he entered the part of his parents' bedroom where the dresser was located, when he entered the part of his parents' bedroom where the closet was located, or perhaps even when his hand entered the drawer where the jewelry was located."

Here the challenged instruction was ambiguous. While a room is part of a building, one could reasonably interpret "part" to include a portion of a room. When a jury instruction is ambiguous, a reviewing court will interpret the instruction in a way that the jury was reasonably likely to interpret it. (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) In making such a determination, a reviewing court will also consider the arguments of counsel. (*People v. Visciotti* (1992) 2 Cal.4th 1, 58-59.)

During closing argument, the prosecutor explained the elements of burglary: "The intent to steal can be formed either at the time the defendant enters the house itself. It can also be formed at the time he enters any room in the house. If you agree he entered the house for an innocent purpose but decided to steal when he went into the parents' bedroom, he's still guilty of it when he goes in the parents' room." Later, the prosecutor argued that "if he crossed that threshold with the intent to take something from his parents' bedroom, he's guilty of a residential burglary."

Defense counsel also correctly stated the law in her arguments. She explained that "[b]urglary is what is known as a threshold offense. Threshold is a description of

a point. It's a point of entry into a building or vessel, car, something like that. And the threshold is essentially that wooden frame around a door. That's the point in time where we're talking about with regard to specific intent, the intention at the time of the entry. . . . [¶] The evidence in this case is insufficient with regard to the specific intent at the time of the entry into this house, either at the front door, at the window or at the bedroom door, that Mr. Ly had the specific intent to steal in this case at that point in time." She repeatedly argued that he did not have the requisite intent either when he entered the house or the bedroom.

Here the trial court instructed the jury that in order to convict defendant of burglary it was required to find that he had the specific intent to steal when he entered the house or a part of the house. Both counsel repeatedly stated that the jury could return a verdict of guilty only if they found that defendant had the requisite intent when he entered either the house or the bedroom. Given counsels' arguments and that a room is a part of a house, defendant has not suggested how the jury would have decided to convict defendant on an incorrect theory. Accordingly, defendant has failed to establish that there was a reasonable likelihood that the jury misinterpreted the instruction.

B. CALJIC 2.15

Defendant next contends that the trial court erred in giving CALJIC 2.15. He claims that this instruction violates due process.

The trial court instructed the jury: "If you find that a defendant was in possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of burglary and/or theft. Before guilt may be inferred, there must be corroborating evidence tending to prove Defendant's guilt. However, this corroborating evidence need only be slight and need not be, by itself, sufficient to warrant an inference of guilt. As corroboration, you may consider the attributes of possession, time, place and manner

that the defendant had an opportunity to commit the crime charged, the defendant's conduct, and any other evidence which tends to connect the defendant with the crime charged."

"[W]here identity of a perpetrator is in dispute or sought to be proved by circumstantial evidence, CALJIC No. 2.15 protects the defendant from unwarranted inferences of guilt based solely on possession of property stolen in the charged offense." (*People v. Holt* (1997) 15 Cal.4th 619, 677.) Courts have upheld due process challenges to CALJIC No. 2.15. (*People v. Yeoman* (2003) 31 Cal.4th 93, 131; *People v. Prieto* (2003) 30 Cal.4th 226, 248.)

Defendant argues, however, that since he conceded that he committed the theft at the Ly residence, then CALJIC No. 2.15 impermissibly permitted the jury to infer that he had formed the intent to steal before he entered the house or his parents' bedroom.

We agree with defendant that when he conceded that he had committed the theft of his parents' jewelry and other items, the trial court was not required to instruct the jury pursuant to CALJIC No. 2.15. We review errors in jury instructions under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman* (1998) 19 Cal.4th 142, 172-178.) Thus, the judgment must be reversed only if "an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*Id.* at p. 165.)

Here the trial court instructed the jury to "[c]onsider the instructions as a whole, and each in light of all of the others." The trial court also correctly instructed the jury on all elements of burglary and theft, and that in order to prove these offenses, each of the elements must be proved beyond a reasonable doubt. Defendant conceded that he had committed the theft of his parents' property. But even with this concession, CALJIC No. 2.15 did not direct the jury to find defendant guilty of burglary. It was still required to find beyond a reasonable doubt that defendant formed the intent to

steal when he entered the Ly home or their bedroom. Thus, it is not reasonably probable that the error affected the outcome.

C. Other Crimes Evidence

Defendant also contends that the trial court erred in admitting evidence that he had previously used drugs and stolen from his parents.

Prior to trial, defense counsel brought a motion to exclude any testimony that he was under the influence of a controlled substance when he was arrested, or had otherwise used drugs in the past. He claimed that such evidence would be irrelevant and unduly prejudicial under Evidence Code section 352. The prosecution argued that the evidence was relevant to show why his father had thrown him out of the house and as a motive to commit the charged offenses. She also argued that it would be relevant if defense counsel suggested that the Lys were biased. The trial court ruled that it would allow a brief mention that defendant was asked to leave for drug-related reasons.

During the direct examination of Mr. Ly, he was asked: "Q. In October of last year, were you allowing [defendant] to live at home with you? [¶] A. No. [¶] Q. Why had you asked him to leave? [¶] A. Because every time he smoked drug or marijuana, I don't know, he would always steal things." On cross-examination, defense counsel asked Mr. Ly: "Q. Prior to that point in time [the night of October 18], [defendant] had been staying at the house; right? [¶] A. Well, when I allowed him to stay in the house was when he did not use drugs. [¶] Q. But he had been staying at the house; right? [¶] A. Yes. [¶] Q. And it was only the night when you came home on the 18th that you told him you didn't want him to live anymore, right – live there anymore I mean. [¶] A. He kept bothering me. He would steal things."

In her closing argument, the prosecutor stated: "He has a motive, as his father testified. He has a drug problem, and he's stolen in the past. What we have here, with the exception of the screwdriver, the knife and the jewelry are all things that can be

pawned for quick cash and used for drugs. [¶] . . . [¶] Whether or not you agree at what point he formed [the intent to steal], he took the jewelry and the screwdriver and the knife out of the house, and he did it because he needed money for drugs."

Here defendant did not move to strike this testimony, and thus has waived the claim on appeal. (Evid. Code, § 353; *People v. Mickle* (1991) 54 Cal.3d 140, 187.) Defendant argues, however, that he has not waived the issue. He claims this issue was litigated prior to trial, and thus an objection would have been futile. We disagree. Though the trial court ruled that a brief mention of drug use was admissible, it made no ruling as to prior thefts. If defendant had moved to strike the testimony when Mr. Ly first made the reference, the trial court could have given a limiting instruction to minimize any prejudice. As for the evidence of drug use, the trial court admitted this evidence so that the jury would not speculate that the Lys asked defendant to leave home because he had committed more serious offenses. The trial court also stated that it would consider a limiting instruction if trial counsel wanted to draft one. No such instruction was requested.

Defendant next argues that trial counsel provided ineffective assistance.

"A defendant seeking relief on the basis of ineffective assistance of counsel must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 440.)

Even assuming that a reasonably competent attorney would have moved to strike this testimony or requested a limiting instruction, defendant has failed to establish prejudice. Given that Mr. Ly's comments were brief, and defendant conceded the theft of his parents' property, defendant has not shown a reasonable probability of a more favorable result had the testimony been stricken and a limiting instruction given.

III. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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McAdams, J.